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No. 00-1238

IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware corporation,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Petition For Writ of Certiorari To The Oregon Court of Appeals

AMICUS CURIAE BRIEF OF AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF THE PETITION

Of Counsel:
WILLIAM R. MURRAY
AMERICAN FOREST & PAPER ASSOCIATION
1111 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 463-2782

STEVEN P. QUARLES
Counsel of Record
THOMAS R. LUNDQUIST
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2500

Attorneys for the American Forest & Paper Association

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INTEREST OF *AMICUS CURIAE*

Amicus American Forest & Paper Association ("*amicus*" or "AF&PA") is the national trade association representing the forest products sector of the economy.[1] Our members have profound business interests in the issues in this case. AF&PA supports the position that the Endangered Species Act ("ESA"), concepts of fairness, and the U.S. Constitution all place "upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 735-36 (1995) (Justice Scalia, dissenting).

Amicus's members own the majority of commercial private timberlands in the United States. Many States regulate timber harvesting on private lands under State Forest Practices Acts. Under these programs, several States have done more than inform the private landowner of his or her duty to avoid ESA § 9 "take" of listed wildlife. They have adopted regulations which idle substantial acreage around the nesting sites (or other suitable habitat) of an ESA-listed species, and thereby prevent economic uses of the timber resource in the resultant State-created wildlife preserve. Our view is that many such broad deprivations of economic property uses are compensable under the Fifth and Fourteenth Amendments.

This case well illustrates *amicus*'s concern over uncompensated land use prohibitions imposed in

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[1] Letters indicating the parties' consent to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amicus* certifies that counsel for a party did not author this brief in whole or in part and that no person other than *amicus* made a monetary contribution to the preparation of this brief.

implementation of the ESA. Boise Cascade Corporation (a member of AF&PA) sought to harvest timber on the 65 acres of timberlands it owned in Clatsop County, Oregon. The State Forester disapproved "Boise's harvesting plan because the plan did not . . .protect[ ] 70 acres of suitable spotted owl habitat encompassing the nesting site" for a pair of threatened northern spotted owls, as required by statute. *Boise Cascade Corp v. State of Oregon*, 991 P.2d 563, 564-65 (Or. Ct. App. 1999), Pet. App. A.

Amicus's members face similar State law requirements to dedicate substantial acreage to what are effectively spotted owl preserves in California and Washington. Our members face other duties to preserve wildlife habitat in many other States. Thus, *amicus*'s members are pervasively affected by the order of the court below.

Amicus wishes to present the position that the recurring and unresolved just compensation issues in this case warrant the Court's grant of certiorari and its reversal of the judgment below.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case. We provide below some legal context on the Endangered Species Act and on how States regulate beyond the ESA § 9 "take" prohibition under State Forest Practices Acts.

1. The ESA protects members of a species which has been listed, under ESA § 4 (16 U.S.C. 1533), as an "endangered species" or "threatened species." The U.S. Fish and Wildlife Service ("FWS") listed the northern spotted owl (which is one of several *subspecies* of *Strix occidentalis*) as a threatened species in 1990. *See* 55 Fed. Reg. 26194 (June 26, 1990). The range of the northern spotted owl ("spotted

owl" or "owl") extends from California, through Oregon and Washington, and into Canada. *See id.*; 50 C.F.R. 17.11.

2. ESA § 9(a) makes it "unlawful for any person subject to the jurisdiction of the United States" to "take any [endangered] species [of fish or wildlife] within the United States." 16 U.S.C. 1538(a)(1)(B). FWS has extended the "take" prohibition to less-imperiled *threatened* species of fish and wildlife (such as the spotted owl), pursuant to discretionary authority delegated by ESA § 4(d), 16 U.S.C. 1533(d). *See* 50 C.F.R. 17.21(c), 17.31(a). Because § 1538(a)(1)(G) makes it unlawful to violate an ESA regulation, essentially the same prohibitions on "take" apply to all endangered and most threatened species of fish and wildlife ("listed wildlife").

3. The ESA defines "take" in terms of active conduct which injures listed wildlife, not failure to preserve habitat benefits. "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" listed wildlife or "to attempt to engage in any such conduct." 16 U.S.C. 1532(19). FWS has defined "harm" to include a habitat modification action (e.g., cutting trees), *if* that action "actually kills or injures wildlife."

> **Harm** in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. 17.3. This Court upheld the facial validity of the "harm" rule based on the interpretation (and upon representations from the Solicitor General) that the rule "emphasizes that actual death or injury for a protected

animal is necessary for a violation." *Babbitt v. Sweet Home*, 515 U.S. at 691 n.2; *see id.* at 697-703; *see also id.* at 708-09.

4. States have no ESA enforcement responsibilities. Instead, ESA § 11, 16 U.S.C. 1540, grants authority to prevent private actors from "taking" listed wildlife to FWS, to the Department of Justice, and to private citizens (through the citizen suit provision in ESA § 11(g)). ESA § 6 provides for voluntary state participation in implementing the ESA under a traditional "carrot-and-stick" incentive of federal funding if the state decides to assist in implementing the ESA. 16 U.S.C. 1535(c) and (d).[2]

5. Oregon, like several other States, has adopted a State Forest Practices Act to regulate commercial timber harvesting on private and State lands. OR. REV. STAT. §§ 527.610 *et seq.* (1999). Though the terms of the Forest

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[2] Accordingly, the view of a few lower courts that "take" avoidance requires States to structure their regulatory programs to avoid "take" (e.g., *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert. denied sub nom. Coates v. Strahan*, 525 U.S. 978 (1998)) is difficult to reconcile with ESA § 6's concept that a State can decline to enforce the ESA. Instead, a state permit which is "less restrictive" than the federal "take" prohibition seems to be legally ineffective under ESA § 6(f), 16 U.S.C. 1535(f), without dragooning the State into implementing federal law. The ESA "neither compels nor precludes local regulation; it preempts that which is in conflict." *Loggerhead Turtle v. County Council of Volusia County, Florida*, 92 F. Supp. 2d 1296, 1303, 1307 (M.D. Fla. 2000). Ultimately, the ESA cannot be read as compelling States to use their regulatory programs to enforce the ESA's "take" prohibition because the Tenth Amendment ensures that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 933 (1997). Thus, Oregon's rules on preserving a fixed amount of suitable owl habitat appear to be the voluntary act of a sovereign State.

Practices Acts vary State by State, the Acts usually grant authority to the State forester to adopt regulations requiring the use of certain timber harvesting practices and providing levels of State-desired environmental protection. *See* OR. REV. STAT. §§ 527.670, 527.714-.770 (1999).

Pursuant to its Forest Practices Act, the Oregon Forestry Department adopted rules prohibiting timber harvesting on the 70 acres around each owl nesting site that provide the most suitable habitat for a pair of spotted owls. "A 70 acre area of suitable owl habitat encompassing the nest site, [must] be maintained as suitable owl habitat." OR. ADMIN. R. 629-665-0210 (2000), Pet App. J; *see Boise Cascade*, 991 P.2d at 564 n.1, Pet. App. A (quoting the functionally identical former OR. ADMIN. R. 629-24-809 in effect when Petitioner sought the State's approval).

6. *Amicus*'s members are also subject to analogous owl habitat rules under Forest Practices Acts of California and Washington. As in Oregon, those rules require that substantial acreage of economically valuable mature timber be preserved as suitable owl habitat. In California, timber harvesting is generally prohibited where it would not retain "500 acres of owl habitat . . . within a .7 mile radius of the active nest site or pair activity center" and "1336 total acres of owl habitat must be provided [within] 1.3 miles of each nest site or pair activity center." CAL. CODE REGS. Tit. 14, 919.9 and 939.9 (1999). In Washington, through 1996 timber harvesting was prohibited in the "most suitable 500 acres . . . surrounding a spotted owl site center." WASH. ADMIN. CODE 222-16-080(h) (2000). While, under the current rules, the acreage where timber harvesting is precluded varies according to the area involved, substantial acreage remains off-limits to economic use of the renewable timber resource. *See id.*

7. The spotted owl habitat rules in Oregon, California, and Washington impose huge economic costs on those landowners unlucky enough to have that listed species on their lands. In Boise Cascade's case, a jury found that, during the 4½ years when timber harvesting was prohibited (before the owls left the area), the value of Petitioner's timber decreased by $1,820,059. Pet. App. T.

Another economic quantification of the cost of providing owl preserves on private lands is provided in Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419 (1994). "At today's market value, timber prices can range from $10,000-$40,000 per acre, depending on the wood species." 24 ENVTL. L. at 427). Thus, unless just compensation is available under the Fifth and Fourteenth Amendments, the cost to the landowner of providing an owl preserve of 500 acres of mature timber for a *single* pair of spotted owls can run from $5 to 20 million.

8. Finally, two other ESA provisions have relevance to the issues in this case. First, the 1973 Congress which enacted the ESA adopted a compensatory land acquisition program as the only ESA "program to conserve fish, wildlife, and plants" (i.e., habitat) on private lands. ESA § 5, 16 U.S.C. 1534; *compare* §§ 1531(c)(1), 1533(f), 1536(a)(1) (duties to conserve applicable to federal agencies and federal lands). Congress authorized the acquisition of land "interests" such as conservation or non-development easements/servitudes. 16 U.S.C. 1534.

Second, the 1982 Congress, concerned with the constraints being imposed on productive land uses under interpretations of ESA § 9 "take," adopted two provisions for authorizing the unintentional or "incidental take" of listed wildlife. Where there is some federal action which would

not jeopardize the existence of a listed species, ESA § 7(b)(4) and (o)(2) direct FWS to issue what is known as an incidental take statement. 16 U.S.C. 1536(b)(4) and (o)(2). Where there was no federal action, ESA § 10(a) creates a roughly comparable process whereby a non-federal entity can apply for and possibly obtain a permit allowing incidental take of listed wildlife. 16 U.S.C. 1539(a). A landowner who decides to invoke the ESA § 10(a) permit process must prepare (and agree to commit some lands and dedicate funding to) a habitat conservation plan. *See* 16 U.S.C. 1539(a)(2); 50 C.F.R. 17.32(b); Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991).

Pursuing an ESA § 10(a) permit "is not mandatory." *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928 (9th Cir. 2000). Further, where there is only a speculative possibility that a land use activity would cause "take," a private "party may proceed without a permit," *id.*, and the activity should not be enjoined. *American Bald Eagle v. Bhatti*, 9 F.3d 163, 165-67 (1st Cir. 1993). In a risk-of-take situation, the landowner has the discretion to make a difficult decision on how to proceed, but "risks civil and criminal penalties if a 'take' occurs." 204 F.3d at 927; *see* Steven P. Quarles et al., *Sweet Home and the Narrowing of "Take" Under Section 9 of the Endangered Species Act*, 26 ENVTL. L. REP. (ENVTL. L. INST.) 10003, 10007-09 (Jan. 1996).

REASONS FOR GRANTING THE WRIT

1. The writ should be granted so that this Court can provide supervisory guidance on recurring issues of great public significance which directly implicate constitutionally-protected property rights. "[T]he Takings Clause ..., as much a part of the Bill of Rights as the First Amendment or Fourth

Amendment, should [not] be relegated to the status of a poor relation," in the constitutional scheme. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994). This Court's guidance is critical to ensure that "[t]he right to enjoy property without unlawful deprivation," which "is in truth a 'personal' right," does not go unprotected. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

Broadly stated, the issue could be phrased as follows: Does a duty under State law to preserve considerable private acreage as suitable habitat for a wildlife species require payment of just compensation under the Fifth and Fourteenth Amendments?

This issue has great economic significance to owners of private property. Many owners of timberlands feel that, if their property is pressed into public service as a *de facto* wildlife refuge, the public should pay the costs of providing and maintaining those wildlife habitat benefits. Allocating to the public the costs of providing the general benefit of species protection serves one of the principal purposes of the Takings Clause, "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The issue also is very important to local, state and federal officials. Government officials need guidance regarding when requirements to preserve wildlife habitat require compensation, so they can adjust their regulatory programs and land acquisition programs accordingly.

Finally, the question of who should pay the costs associated with foregoing economic property uses to maintain wildlife habitat is one of general public interest and importance. The significance of this question is illustrated

by the extensive legal commentary on when ESA-related land use constraints require compensation under the Fifth and Fourteenth Amendments.[3]

These academic writings provide legal and policy perspectives on the questions implicated by the Petition: (1) Is a duty to maintain listed species on private property a physical occupation taking that is *per se* compensable under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S.

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[3] The ample literature since 1995 includes James Rosen, *Private Property and the Endangered Species Act: Has the Doctrine of Ripeness Stymied Legitimate Takings Claims?*, 6 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 31 (1999); Comment, *Denial of Permission to "Take" an Endangered Species Will Amount to a "Taking" Under the Fifth Amendment in Limited Situations*, 21 U. ARK. LITTLE ROCK L. REV. 519 (1999); Blaine Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, YALE J. ON REG. 329 (1998); Srinath Govindan, *"Taking" Steps to Protect Private Property and Endangered Species: Constitutional Implications of Habitat Conservation Planning After* Dolan v. Tigard, 47 EMORY L. J. 311 (1998); Barton Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305 (1997); Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825 (1997); Murray Feldman & Michael Brennan, *Judicial Application of the Endangered Species Act and the Implications for Takings of Protected Species and Private Property*, 26 ENVTL. L. REP. (ENVTL. L. INST.) 10646 (Dec. 1996); Kimberly Rockwell, *The Fifth Amendment Implications of Including Habitat Modification in the Definition of Harm to Endangered Species (Babbitt v. Sweet Home Chapter of Communities for a Great Oregon)*, 11 J. LAND USE & ENVTL. L. 573 (1996); Robin Rivett, *Why There Are so Few Takings Cases Under the Endangered Species Act, or, Some Major Obstacles to Takings Liabilities*, SB14 ALI-ABA 507 (1996); Patrick Parenteau, *Who's Taking What? Property Rights, Endangered Species, and the Constitution*, 6 FORDHAM ENVTL. L.J. 619 (1995); and Albert Gidari, *The Economy of Nature, Private Property, and the Endangered Species Act*, 6 FORDHAM ENVTL. L.J. 661 (1995)

419 (1982)?; (2) Does a duty to maintain suitable habitat for some species amount to a servitude or conservation easement which, if it denies almost all economic uses of property, is a taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)?; and (3) is a *Lucas* taking claim ripe only after the landowner has sought an incidental take permit under ESA § 10(a)? Since the questions for review have been amply ventilated in the academic literature, those questions are well positioned for review at this time.

2. The facts of this case present a strong claim for just compensation. For over 4½ years, Oregon's regulations and denial of the State approvals needed to harvest timber required Petitioner to "maintain[ ] as suitable owl habitat" a "70 acre area" around a nest site for a pair of spotted owls. OR. ADMIN. R. 629-665-0210 (2000). Petitioner was prevented from making economic use of its lands by timber harvesting on all but a few of the 65 acres it owned. A jury found that, during the 4½ years when timber harvesting was prohibited (before the spotted owls left the area), the value of the timber decreased by $1,820,059.

a. Petitioner's first theory for compensation is that Oregon has mandated a physical occupation of private lands by a listed wildlife species and has prohibited Petitioner from excluding an unwanted tenant (the spotted owls) from its lands. This Court has not squarely addressed whether a duty to maintain wildlife or wildlife habitat is a physical occupation calling for compensation under the *per se* takings rule of *Loretto* and its progeny.

Since Petitioner was denied the right to "exclude a stranger's [spotted owls' continued] physical occupation" of its property, the decision below is in tension with this Court's rulings on physical occupation takings. *Loretto*, 458 U.S. at 439 n.17; *see Dolan*, 512 U.S. at 393 (emphasizing

the "the right to exclude" is central to property rights); *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (a "different case would be presented" if a statute or regulation compelled a "landowner over objection to rent his property or to refrain from terminating a tenancy"). Under this Court's precedents, the key factor is whether the government has authorized the continued physical occupation, not whether the government had control over the occupant. *Loretto*, 458 U.S. at 432-33 n.9. Thus, the physical occupation theory warrants review by this Court because the decision below is in apparent conflict with this Court's precedents. *See* Pet. at 12-13, 20-22. Further, since the habitat maintenance requirement may often induce other listed species to use that habitat, Oregon's rules invite physical occupation by more listed species against a landowner's wishes.

Respondents will no doubt continue to argue that duties to maintain wildlife habitat and to not exclude already-present listed species are not *per se* physical occupation takings. Respondents prevailed on that argument in the court below. *See* 991 P.2d at 569-70, Pet. App. A. Moreover, Respondents' argument has been accepted in most of the relevant lower court rulings.[4]

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[4] *See Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) (required habitat for deer); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc) (damage caused by protected wild horses and burros); *Kigli v. City of Santa Cruz*, 620 F. Supp. 609 (N.D. Cal. 1985) (maintaining a greenbelt); *Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc*, 636 So.2d 761 (2d Dist. Fla. 1994) (habitat for eagle nests); *Moerman v. State of California*, 21 Cal. Reptr. 2d 329 (1st Dist. 1993) (damage caused by elk); *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Maine 1982) (required habitat for deer).

But, as the number of lower court opinions attests, courts continue to struggle with this frequently recurring issue. This is an appropriate case for the Court to provide definitive guidance on whether a physical occupation taking occurs when the government mandates the continued presence of wildlife on private lands.

b. The Petition fairly encompasses the related theory that the Oregon rule on maintaining 70 acres of suitable owl habitat creates a servitude that denies all beneficial use of private lands, and that is compensable under *Lucas*. *See* Pet. at 12-13, 21. This theory has a strong basis in this Court's precedents.

Where a State requires "land to be left substantially in its natural state" there is a "practical equivalence . . . of negative regulations [prohibiting development] and appropriation" of a "servitude[ ]" through condemnation of a non-development easement. *Lucas*, 505 U.S. at 1018-19. In either case, the Constitution demands compensation. The "benefits flowing to the public from preservation of open space through regulation [as Oregon has done here] may be equally great as from creating a *wildlife refuge* through formal condemnation" of conservation easements or servitudes. *Id.* at 1018 (emphasis added and internal quotations omitted).

Petitioner's duty under the Oregon regulation to maintain suitable owl habitat might be analogized to the duties in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), to keep an historic property in good repair and to not undertake activities that would alter the status quo. To at least three members of the *Penn Central* Court, the duty to "strictly adhere to their past use" of private property was in effect a government acquisition of a

"servitude" for which just compensation was owed. 438 U.S. at 146 (dissenting opinion of Chief Justice Rehnquist).

Thus, review is amply warranted on the important issue of whether just compensation is owed where a government regulation effectively creates a non-development servitude that preserves wildlife habitat on, and prohibits virtually all economic uses of, private property.

3. The appellate court denied Boise Cascade the compensation a jury had awarded. It did so by ruling that Petitioner's claim of a compensable taking would not be ripe for judicial review until Petitioner first sought an ESA § 10(a) permit, not from Oregon, but from FWS. *See* 991 P.2d at 571-74, Pet. App. A. Whether applying for an ESA § 10(a) permit is required for a ripe takings claim is a recurring issue in case law and the legal literature. The Court should grant the writ to provide guidance on this issue.

Bringing clarity to the unresolved ripeness issue is a particularly important role for this Court. Without this Court's guidance, the uncertainty over ripeness may keep a litigant from having his day in court and allow potentially unconstitutional action to go unchecked simply because "the conscientious jurist might tend to dismiss any close call" on ripeness. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 183 (1987).

Review is further warranted because the ruling below on ripeness is erroneous and pernicious. It would be contrary to the fairness principles which underlie Fifth Amendment jurisprudence to conclude that, where a State agency is the alleged "taker" of property and the State agency has no internal variance procedure, the landowner must seek a variance from a *federal* agency which, if granted, the State agency might or might not find satisfactory under State law.

See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 n.7 (1986).[5] Making the constitutional right of just compensation contingent on seeking a "variance" from someone other than the alleged "taker" is at least in tension with *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985).

Unless this Court corrects the erroneous judgment below, the political branches could create a lengthy maze of Kafkaesque proportions which would be destructive of private property rights.[6] The ability for a State to create a

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[5] Some of the law review commentaries cited above have opined that, where FWS itself has imposed the property use restriction by its "harm" rule, the landowner should be required to seek an ESA § 10(a) permit from FWS before a ripe just compensation claim exists. But the relevant considerations are far different where a State has elected to regulate beyond simply advising private parties of their ESA § 9 duty to avoid "take" (a function already served by OR. ADMIN. R. 629-665-0210(4)) and where it is the State's broader habitat protection action that allegedly requires just compensation.

[6] Under the ruling below, no constitutional claim for just compensation redress is available until: (1) the property owner has applied to the State to make economic use of land and the state has denied those applications; (2) the landowner applies to FWS for an ESA § 10(a) permit, and the landowner bears the considerable costs, time delays, and uncertainty associated with such permits (including the costs of committing to a habitat conservation plan); (3) FWS decides whether the plan may be approved or whether adjustments to the landowner's proposal are desired under FWS's substantial discretion in granting or withholding ESA § 10(a) permits; (4) the landowner decides whether to make the adjustments; (5) FWS decides to issue the ESA § 10(a) permit; and (6) the State decides whether any FWS-granted ESA § 10(a) permit meets the objectives of State law (a decision presumably already made in the permit denial decision and in the absence of a variance procedure under State law). After exhausting those purported ripeness prerequisites, the landowner can often look forward to the seven years of litigation on the just compensation claim which Petitioner has endured (including

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"cumulative" permitting regime "is rife with the possibilities of mischief" precisely because enlisting both State and federal procedures could "easily consume resources that exceed the commercial value of the undertaking subject to the permit power," and would perpetuate a "permit waltz" that excludes landowners from court by requiring them to dance through multiple layers of a permitting process. Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 413 (1995).

The Petition (at 14-20) provides powerful reasons why, legally and factually, the ESA § 10(a) process is not a required "variance" procedure under the *Williamson* line of cases. We would add that, since the ESA § 10(a) process is "not mandatory" (*Bernal*, 204 F.3d at 927), it should not be transformed into a mandatory prerequisite to the constitutional right of just compensation. Further, since the price for any incidental take permit issued by FWS includes the landowner's commitment of lands and funds to a habitat conservation plan, it is at most a "variance with an exaction" which presents additional constitutional concerns. *See Dolan*, 512 U.S. at 385.[7]

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two trips up and down the State court system) thus far in this case. If the lower court's view is accepted, many landowners will decide they cannot afford to run this gauntlet. Property rights will be diminished without an effective avenue for redress.

[7] Since an ESA § 10(a) permit must include a habitat conservation plan and conditions which "minimize and mitigate" take (16 U.S.C. 1539(a)(2)(B)), this suggests that any such permit would require preservation of virtually the same 70 acres around the nest site. Further, OR. ADMIN. R. 629-665-0210(1) (the provision requiring preservation of 70 acres around each spotted owl nest site) was not adopted merely to prevent "take," since that function is already

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4. The "majority of endangered species" occur predominately or partially on private lands. Michael J. Bean, *The Endangered Species Act and Private Land: Lessons Learned From the Past Quarter Century*, 28 ENVTL. L. REP. (ENVTL. L. INST.) 10701 (Dec. 1998). The Court should accept review and reverse in order to create the market incentives necessary to provide long-term protection for those listed species which depend on private lands.

Legal rules which force a few landowners to bear the sometimes high costs of maintaining listed species create economic incentives that are contrary the interests of listed species. For example, those rules encourage landowners to cut timber before it ever becomes suitable habitat for listed species commonly associated with old-growth forests. *See* 28 ENVTL. L. REP. at 10706. The ESA's lofty goals have a better chance of success if just compensation rules exist which make it in a private landowner's interests to grow or maintain suitable habitat for such species.

Owners of mature timberlands are among the least culpable for the current condition of listed species like the spotted owl. Their lands continue to provide the habitat

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accomplished by § 629-665-0210(4). ("Federal law prohibits a person from taking northern spotted owls" and "[c]ompliance with subsection (1) of this rule is not in lieu of compliance with any federal requirements related to the federal Endangered Species Act"). Hence, on the face of the rule, even if FWS grants an incidental take permit, Oregon is likely to continue to require preservation of the same 70 acres that § 629-665-0210(1) directs. This not only suggests that the alleged variance process is futile, but that there is no rational basis under *Nollan-Dolan* to require exhaustion of an incidental take permit process where § 629-665-0210(1) is not expressly designed simply to prevent "take."

needed by the species. The past actions of others in removing forests to create cities, farms, and other land improvements have reduced suitable habitat to the point that ESA listing occurred. Since those past actions have inured to the general public benefit, and since the preservation of habitat for listed species has been determined to be in the public interest, it is fair to have the public pay the costs of providing these habitat benefits.

5. The ESA itself supports landowner compensation when the public desires greater protection of wildlife habitat than occurs under the "take" prohibition. Private landowners are "understandably unwilling" to forego the "clearing of fields and forests for development or resource extraction" in order to provide suitable habitat for listed species, because that forces on a few unfortunate landowners the "excessive costs" of providing habitat benefits desired by the public. 119 Cong. Rec. 30,162 (Sept. 18, 1973) (statement of Rep. Sullivan, the ESA House floor manager).

During the ESA debates, the House and Senate leadership repeatedly distinguished between: (1) the "take" of listed wildlife, which the government ordinarily could prevent by regulation, without providing compensation; and (2) providing additional protections for listed species and their habitats, which the government could only achieve by voluntary cooperation with willing landowners or by providing compensation for the acquisition of non-development easements. 119 Cong. Rec. 30,162 (remarks of Rep. Sullivan); 119 Cong. Rec. 25,669 and 25,691 (July 24, 1973) (remarks of Sen. Tunney and Sen. Nelson). As the Senate Report summarizes, the "two major causes of extinction are hunting and destruction of natural habitat" – the ESA primarily addresses that latter cause by "increas[ing] the amounts authorized to be appropriated to

acquire lands for the purpose of conserving, [or] protecting . . . endangered species." S. Rep. No. 93-307, at 2-3 (1973), 1973 U.S.C.C.A.N. 2989, 2990-91. This explains why the 1973 Congress adopted a compensatory "land acquisition" program as the only "program to conserve fish, wildlife, and plants" located on private lands. ESA § 5, 16 U.S.C. 1534. Here, where Oregon effectively acquired a non-development servitude to create an owl preserve, the ESA supports compensation of Petitioner.

6. In *Sweet Home*, this Court recognized the legitimate role of compensatory land acquisition under ESA § 5 or other law (here, the Fifth and Fourteenth Amendments) where the public desires habitat protection beyond, or in the absence of, a proven ESA § 9 "take" of listed wildlife. 515 U.S. at 702-03. The ESA § 9 prohibition against "taking" listed wildlife does not authorize regulations which replicate the "broad, affirmative duty to avoid adverse habitat modifications" that is imposed with respect to federal lands by ESA § 7, 16 U.S.C. 1536; ESA § 9 is limited to "habitat modification that 'actually kills or injures wildlife.'" *Id.* Thus, the *Sweet Home* majority opinion supports land acquisition with compensation, not uncompensated deprivation of property uses, where a State directs maintenance of wildlife habitat values, in lieu of simply informing private actors of their ESA § 9 duty to avoid the "take" of listed wildlife.[8]

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[8] Oregon's requirement that a "70-acre area" around each spotted owl nest site "be maintained as suitable owl habitat" goes beyond any proven ESA § 9 "take" of owls, and into the domain of providing habitat benefits. No one can state with certainty that retaining less than 70 acres of mature forest habitat will proximately cause the death ("take") of a spotted owl. *See United States v. West Coast Forest Resources Limited Partnership*, No. 96-1575-HO, 2000 WL

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The dissenting justices in *Sweet Home* (Chief Justice Rehnquist, and Justices Scalia and Thomas) read ESA § 5 and the legislative intent as requiring compensation in even more circumstances:

> [H]abitat destruction on private lands is to be remedied by public acquisition, and *not* by making particular unlucky landowners incur "excessive cost to themselves." . . . [T]he land acquisition program [i]s the Act's only response to habitat modification *by private landowners* . . . . The Endangered Species Act is a carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals, but places upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species.

515 U.S. at 728-29, 735-36. Under this well-founded view, the public at large (here, Oregon), not the unfortunate landowner, should pay the costs of maintaining suitable owl habitat on private lands.

CONCLUSION

The writ of certiorari should be granted.

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298707 (D. Or. decided March 13, 2000) (FWS did not prove "take" though timber harvesting would not comply with FWS's guidance on minimum needs for suitable owl habitat). Oregon's 70-acre rule is either a: (1) bright line rule which goes beyond what would cause "take" in every circumstance, and which was adopted as an administratively convenient way to prevent small risks of "take"; or (2) a general habitat preservation rule. Even under assumption (1), in venturing beyond simply prohibiting "take" and in creating a non-development servitude on 70 acres, Oregon has exposed itself to just compensation liability.

Respectfully submitted,

Of Counsel:
WILLIAM R. MURRAY
AMERICAN FOREST &
PAPER ASSOCIATION
1111 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 463-2782

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STEVEN P. QUARLES
Counsel of Record
THOMAS R. LUNDQUIST
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500

Attorneys for the American Forest & Paper Association